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No. 95-710

In The

Supreme Court of the United States

October Term, 1995

MARGARET M. BAKER, ET AL,

Petitioners,

v.

BANK OF BARTLETT, ET AL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, effective October 2, 1995, the Petitioners respectfully submit this "REPLY BRIEF'.

ARGUMENT

PETITIONERS' REPLY TO CONTENTIONS RAISED BY RESPONDENTS IN THEIR "JOINT BRIEF IN OPPOSITION"

1. One reading the respondents' brief would be fallaciously led to believe that discovery was complete and the case ready for trial when summary judgment was granted.

The Respondents have totally mischaracterized the procedural point at which this case stood when it was dismissed summarily. The entire focus of Respondents' brief is to make it appear that discovery was complete in this case and that the case was thus "ready for trial" when it was disposed of upon motion for summary judgment approximately two years after it had been filed. Of course, that would be the natural conclusion for an appellate court to draw when seeing that summary judgment was granted two years after a case was filed. Nothing could be further from the truth. To the complete contrary, the Petitioners have been thoroughly stifled by these defendant banks from even getting started at discovery! For all practical purposes, no meaningful discovery whatsoever had been allowed to the Petitioners. In fact, summary judgment was granted while Petitioners' year-old *motion to compel* discovery was pending.

Rather than to resolve all factual disputes in favor of the motion's opponent as the law requires, the trial court's reasoning in granting summary judgment was conditioned upon an assumption by the court that plaintiffs' experts would not be able to back up their affidavit opinions even if they obtained the documentary proof being sought by plaintiffs' *Request for Production*. The court thus granted summary judgment without even giving plaintiffs the

opportunity to engage in discovery to corroborate their case! Plaintiffs stipulated that the trial court could rule on defendants' motions for summary judgment without resolving the pending *motion to compel* because had the trial court correctly applied the standards for summary judgment, it would have been forced to rule that the pretextual affidavits filed by the defendants were undoubtedly insufficient to carry their burden for purposes of summary judgment. Once this *motion* was denied, then discovery would have finally proceeded so as to enable the plaintiffs to pursue their case and prove the tacit collusion between the defendants with sufficient evidence to satisfy the court.

That is why the ruling of the lower courts is so glaringly erroneous. The ruling is exactly the opposite of how summary judgment standards are to be applied, even in tacit antitrust cases. The defendants filed conclusory, pretextual affidavits which were **totally unsupported by any documents** to support their motion for summary judgment. The plaintiffs countered this with **meaningful, detailed** affidavits by very competent expert witnesses. The internal bank documents which these experts needed to corroborate their opinions were withheld by the defendants and the plaintiffs immediately moved to file a *motion to compel.* While this stalemate was pending, the trial court granted summary judgment, solely because plaintiffs' experts had no documentary proof/evidence to corroborate their opinions! The court reasoned that it would be too speculative to allow the case to go to a jury without plaintiffs having a case based on more concrete documentary evidence when it was the court's own ruling that denied plaintiffs the opportunity to develop and generate such proof. The trial court's interpretation that Matsushita supported its decision was incorrect as the present case has one critical element which the court found lacking in Matsushita, the **motive** to conspire.

Respondents state at page 3 of their *Joint Brief in Opposition* (hereinafter referred to as "*Joint Brief*") that the *"plaintiffs admitted that they had no direct evidence of any agreement or conspiracy among the Banks to set prices."* It is true that this class action case was filed on the basis of **tacit** collusion rather than proof of a direct agreement to set prices. The issue that this appeal deals with is **most important**. This cases gives this Court an ideal opportunity to clarify confusion among the lower courts as to just how much

"proof" is required to overcome summary judgment in a tacit collusion case, to further the attempts which have been made in Matsushita and Eastman Kodak but which apparently still need "fine tuning."

Respondents attempt to downplay the significance of this case by concluding (their) argument at the bottom of page 7 of their *Joint Brief* that *"the present case is no more significant or important than any other summary judgment case that is decided on a factual record."* Petitioners would submit that it can not be repeated enough that the present case is probably not only the most important consumer rights case to affect the citizens of the State of Tennessee in the past twenty-five years but the citizens of this entire country as well, not just the defendants herein as the same situation of parallel pricing by banks on these subject check processing fees permeates every locality. A victory by the plaintiffs herein will be felt by every single bank in this country. Certainly then, the present case is more important than the typical summary judgment cases that are decided by the courts of this country each day. If significance and importance to the American public were the only criteria used by this Court to determine whether to grant cert, this case would accordingly head the list of those cases which this Court determined to hear.

In this case, the reason why the plaintiffs have not been able to put any documentary "evidence" or "proof" into the Record at present is because - as hard as this may seem - the defendants have not come forward to produce even one document that has been requested of them by the plaintiffs in their "First Set of Interrogatories and Requests for Production" which was served on the defendants together with service of the *Complaint*. When the defendants failed to adequately answer these, the petitioners filed a *"motion to compel."* After months and months of pleadings and counter-pleadings with respect to plaintiffs' motion to compel production of these documents, in December of 1993, the Magistrate finally (conditionally) ordered the defendant banks to turn over these documents, which if done, would have finally started the "discovery" process. However, the defendants filed "motions to clarify" with respect to this Order and ultimately, then appealed the Magistrate's ruling to the presiding judge. While this motion was pending, summary judgment was granted.

Ultimately, when discovery is complete, the plaintiffs will not only be able to furnish the trial court the "evidence" it ruled was needed to prevail against summary judgment in this type of action, but further, perhaps even obtain through discovery from one of the defendants' employees who are involved with processing checks an admission of a direct agreement among the banks! Of course, antitrust case law clearly states that such direct evidence is not necessary to even prevail at trial, and thus certainly not necessary to withstand a motion for summary judgment! The lower courts herein have misinterpreted Matsushita to require the plaintiffs in a tacit price-fixing collusion case to present far more evidence at this stage of the proceeding than is required to withstand the motion for summary judgment, especially when the defendants accused have a great, overwhelming motive/incentive to participate in the alleged collusion as the banks do here.

2. *The defendants keep emphasizing "facts" when the case was dismissed without affording the plaintiffs the opportunity to develop such facts so as to have the opportunity to refute the totally conclusory contentions advanced by the banks. Further, the defendants never introduced any facts into the Record at all, instead only filing conclusory affidavits which they failed totally to corroborate with any admissible "evidence".*

Toward the end of the first full paragraph on page 3 of their *Joint Brief*, defendants contend that plaintiffs' expert affiants have

> "merely stated that, based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks. These opinions had no basis in fact, were completely unsupported by the record and actually ignored the undisputed facts placed into the record by the banks."

After first pointing out that the defendants make no attempt at all to explain what "undisputed facts placed into the record" they are

referring to,[1] counsel for plaintiffs would now respond in order to each of these arguments.

a) "based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks."

Apparently, the point of defendants' criticism is that plaintiffs' experts' opinions are based solely on their review of the "pleadings" as opposed to a review of "something else." However, in this case, since the defendants stymied plaintiffs' attempts to obtain the documents from defendants, there was nothing else but the pleadings for such experts to base their affidavit testimony upon. These pleadings consist of the 1) Complaint, 2) defendants' respective Answers to Complaint, and 3) Answers to Plaintiffs' Interrogatories and Requests, wherein the defendants make pathetically pretextual attempts to explain the manner in which they arrived at their NSF pricing structure independent of what each of the other banks was doing. But this procedure, filing expert affidavit opinions based on the pleadings to date, is exactly what summary judgment is all about! Because the defendants have failed to furnish any documentation sought by these experts to substantiate their opinions, plaintiffs' experts have nothing else to rely on in the posture in which the case presently stands.

Here, the trial judge did indeed find that there was a prima facie case of price-fixing on the basis of "the pleadings." These "pleadings" included the one and only "document" which the banks attached to their Answers to Interrogatories and Requests; that is, the price rate sheet which each defendant bank leaves at the bank teller counter (and other places in the lobby of the bank) to inform the public of their prices, which prices the trial court found amounted to prima facie evidence of similar pricing under the antitrust law. Nonetheless, the trial court then went on to hold that there was not enough "proof" from which a jury could find that the inference of collusion so as to achieve these remarkably similar prices was greater than the inference that such prices were attained by independent action. Plaintiffs' experts, on the other hand, persons

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[1] because the defendants have indeed failed to so place any such "facts" into the Record.

with vast experience in antitrust and banking areas, stated under oath that they could explain to the jury how it was virtually impossible for the defendants to maintain their complained-of prices without some form of collusion. These experts of course had no documents to corroborate what they offered to explain because the defendants refused to produce the very documents which these experts said would do just that, substantiate their theories!

b) "These opinions had no basis in fact"

As just explained, plaintiffs experts did not have proof of a direct conspiracy but did have all the "facts" they needed to testify under oath by affidavit that the defendants could not maintain the prices which they reviewed without resorting to tacit collusion. They stated that the defendants absolutely could not arrive at such prices by independent action. Thus, plaintiffs' experts' opinions were indeed "based on the (limited) facts" which were made a part of the Record at the time. Defendants successfully withheld the documents which these experts wished to see by appealing the Magistrate's Order to produce such documents and now want to fault these experts for not relying on more facts in the Record when it is they who refused them access to such "facts". The trial judge was thus obligated to apply the principles of law for summary judgment that mandate that all factual disputes be resolved in favor of the motion's opponent.

c) (said opinions were) "completely unsupported by the record"

Again, the defendants do not explain how these experts' opinions differ from anything in the Record because it's a completely false contention. To the contrary, plaintiffs' experts' opinions were supported by the Record because that is exactly what they based their opinions on, the very limited documents which were filed by the defendants themselves as attachments to their *Answers to Interrogatories.* Certainly the defendants do not mean that plaintiffs' experts' opinions were unsupported by the Record because they were contrary to the self-serving affidavits filed by each bank's representative wherein they swore that they did not collude with representatives from the other area banks in setting their NSF prices!

d) (said opinions) "actually ignored the undisputed facts placed into the record by the banks"

This contention was briefly alluded to supra, page 4. At the risk of repetition, there is not even the slightest attempt by the defendants in their *Joint Brief* to explain what "undisputed facts" they are referring to. The reason is because, again, it is false; there are no such "undisputed facts" in the Record. In fact, the defendants placed no facts whatsoever in the Record except the rate charts which showed how much they were charging for NSF and DIR services. And on the basis of same, the trial court found prima facie evidence of illegal price-fixing!

In the last paragraph on page 3, defendants contend that they *supported their motions for summary judgment with affidavits setting forth the bases on which they made decisions in setting NSF and DIR fees.* As was explained in the petitioners' Petition for Writ of Certiorari herein, the defendants never explained any bases at all for how they set these subject fees. Instead, they submitted affidavits which contained totally **conclusory** statements that they do not collude but were then glaringly unable to explain how they arrived at such fees either in writing or in deposition.[2]

Even more remarkably, the defendants' next sentence makes claim that *each bank **established** that its pricing decisions were made independently.* The "fact" is that the banks "established" nothing. They were offered the opportunity in answering this very questions posed to them by Interrogatory to explain rationally how they set their prices and failed woefully, offering absolutely nothing but pretextual, conclusory statements. Certainly, the defendants are not suggesting that their affiants' conclusory statements that they do not engage in collusion with other banks and that they set prices independently constitute "undisputed facts." If that were true, then plaintiffs' experts' opinions would likewise be entitled to be classified as "undisputed facts."

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2 Excerpts from these limited depositions were cited in petitioners' Petition.

3. Respondents' contention that Petitioners are raising factual issues before this Court rather than a legal issue concerning the standard for summary judgment is totally off base.

At the top of page 7 of their *Joint Brief*, defendants contend that

> "The only real question Petitioners raise is not a legal issue regarding the correct standard for summary judgment but a factual issue."

Defendants then cite this Court to three cases that stand for the principle that this Court's purpose is not to make a third review of the facts so as to see if there are sufficient facts to find "proof" of a conspiracy. It should be obvious from Petitioners' original Brief and the contents earlier in this Reply Brief that the Petitioners have never so much as even suggested that this Petition is based on some error in the lower courts' review of the facts, as defendants here contend. Instead, the Petition makes it clear throughout that it is based on the lower courts' error in applying the law to the Record in the posture in which the present case stood at the time summary judgment was granted.

The above cited contention of the defendants is rather astonishing in light of the fact that it is totally contrary to the correct synopsis of the basis for plaintiffs' Petition. It represents the defendants' tactics in successfully camouflaging the real issue before both lower courts so as to obtain the ruling in their favor, and now attempting to distort same before this Court, so that they can again circumvent justice. An admission that this Petition is based on the legal standards to be applied in summary judgment can lead only to the conclusion that the lower court decisions were clearly in error under both Matsushita and Eastman Kodak. Plaintiffs do not ask this Court to review the lower courts' review of the facts because as has been explained supra, plaintiffs have been denied the opportunity thus far to develop any facts. When the plaintiffs' attempts to develop such facts ran into the defendants' roadblock, and a *motion to compel* was pending, the trial court made a remarkable assumption, in effect choosing to assume that plaintiffs would not be able to ever successfully develop such facts! Plaintiffs appeal to the appellate court was based on the argument that the

trial court incorrectly applied the proper legal standard for summary judgment in a tacit price-fixing case. Likewise, the Petition to this Court is based on the same legal issue that the appellate court fell into the same trap and incorrectly applied the standard for deciding summary judgment to the present case based on the posture in which it stood when summary judgment was granted. The only role which facts have had in the present case is that the trial court failed to assume the facts favorable to the plaintiffs' position as it was required to do under the principles for ruling upon a motion for summary judgment, instead doing entirely the opposite. Plaintiffs do not ask this Court to make a third review of the facts as defendants assert as that would indeed not be the proper type of issue to raise before this Court in a Writ for Certiorari.

CONCLUSION

The importance of this case can not be overemphasized. Defendants argue that this is a "run of the mill" everyday summary judgment case dismissed on the factual record which the appellate courts see hundreds of times each year when it is unequivocally the most important case each bank has faced since its inception. The potential class affected represents hundreds of thousands of persons with several hundred million dollars at stake! The defendants contend that the decision is not adverse to any decision out of the other circuits nor in conflict with any prior decision of this Court. Defendants contend that the decision is not in conflict with the 1992 ruling by this Court in Eastman Kodak when in fact it is in direct conflict. Defendants attempt to distinguish the present case from Eastman Kodak by pointing out that the plaintiffs there had much more concrete evidence to support their case. However, the point which Eastman Kodak would make to this case is that the plaintiffs here are entitled to be afforded the opportunity to develop that proof and not be thwarted at this point by summary judgment. Plaintiff here had enough "evidence" at the present time and in the present posture to withstand summary judgment and be allowed to continue the case, obtain discovery, and present the evidence to a jury.

The Court in Eastman Kodak held that the trial judge was in error in granting summary judgment on the basis of the Matsushita

ruling because the defendants in Eastman Kodak had plausible economic incentive or motive to collude, which was lacking in Matsushita. This is the identical to what has occurred here. This Court granted certiorari in Eastman Kodak to clarify to the lower courts the level of proof which was necessary to move forward in this identical situation. The lower court opinions herein are directly in conflict with how Eastman Kodak ruled such standards are to be applied. This case presents an ideal opportunity for this Court to further finish its business begun in Eastman Kodak, as it is obvious that there is still confusion in interpretation in this all important area of the law.

Even if this case did not meet the exact criteria of Supreme Court Rule 10.1, its importance to each and every American consumer mandates that this High Court review the case by granting certiorari. It is outlandish for the defendants to make the statement that this case is no more significant or important than any other everyday summary judgment case that is decided on a factual record. Due to the magnitude of persons it will affect, and the hundreds of millions of dollars that are at issue in Tennessee alone and the billions nationwide, it is instead perhaps the most significant and important antitrust case in the past decade, if not longer. To have dismissed a case such as this at its present posture on a motion for summary judgment was clearly error. For these reasons, certiorari should accordingly be granted.

Respectfully Submitted,

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